

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

_____)	
In the Matter of)	
)	Docket No. 2012-6 CRB CD 2004-2009
Distribution of the 2004, 2005, 2006)	(Phase II)
2007, 2008 and 2009)	
Cable Royalty Funds)	
_____)	

_____)	
In the Matter of)	
)	Docket No. 2012-7 CRB SD 1999-2009
Distribution of the 1999-2009)	(Phase II)
Satellite Royalty Funds)	
_____)	

**MPAA-REPRESENTED PROGRAM SUPPLIERS’
RESPONSE TO PROPOSED FINDINGS OF FACT AND
PROPOSED CONCLUSIONS OF LAW**

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GLOSSARY

<u>Term</u>	<u>Definition</u>
1999-2009 Satellite Funds	1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009 Section 119 royalty funds collected by the Licensing Division of the Copyright Office
2000-2003 Decision	<i>Distribution Of The 2000, 2001, 2002, And 2003 Cable Royalty Funds</i> , 78 Fed. Reg. 64984 (October 30, 2013).
2000-2009 Satellite Funds	2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009 Section 119 royalty funds collected by the Licensing Division of the Copyright Office; the only satellite royalty years remaining in controversy in this proceeding in the Program Suppliers category
2004-2009 Cable Funds	2004, 2005, 2006, 2007, 2008, and 2009 Section 111 royalty funds collected by the Licensing Division of the Copyright Office
CARP	Copyright Arbitration Royalty Panel
CDC	Cable Data Corporation
CRT	Copyright Royalty Tribunal
CSO	Cable System Operator
D.C. Circuit	U.S. Court of Appeals for the District of Columbia Circuit
Devotional Claimants	Syndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions
DMA	Nielsen Designated Market Area
Gracenote	Gracenote, Inc., formerly known as Tribune Media Services, Inc.
Household Meter	Nielsen data collection device which measures television set tuning (<i>i.e.</i> , what channel the set is tuned to).
IPG	Worldwide Subsidy Group LLC d/b/a Independent Producers Group
Judges	Copyright Royalty Judges

Librarian	Librarian of Congress
May 4 Order	<i>Order Reopening The Record And Scheduling Further Proceedings</i> (May 4, 2016).
MPAA	Motion Picture Association of America, Inc., and its represented Program Suppliers claimants
MSO	Multiple System Operator
Nielsen	The Nielsen Company
Nielsen Diary Data	Viewing data used for generating national cable and broadcast network ratings collected from Nielsen diaries during 2000-2003 for the “sweeps” months of November, February, May, July, and in some cases October and March
Nielsen Distant Viewing Diary Data	Nielsen’s custom analyses of the Nielsen Diary Data of compensable viewing for the Kessler Stations
Nielsen Local Ratings Data	Nielsen local ratings data for the Gray Stations
Nielsen Distant Viewing Household Meter Data	Nielsen’s custom analyses of the NPM database measuring distant viewing to cable and satellite households for 2008 and 2009.
NPM	Nielsen’s National People Meter database
PCL	Proposed Conclusion Of Law
People Meter	Nielsen electronic data collection device, which is the equivalent of the household Set Meter in that it identifies what channel the set is tuned to, but also has a separate meter which allows people to push buttons to indicate which viewers in the household are in the room.
PFF	Proposed Finding Of Fact
Preliminary Hearing Order	<i>Memorandum Opinion And Ruling On Validity And Categorization Of Claims</i> (March 13, 2015).

Program Suppliers	Syndicated series, specials and movies, other than Devotional Claimants programs as defined below.
	Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music video shows, cartoon shows, “PM Magazine,” and locally hosted movie shows
SDC	Settling Devotional Claimants
Section 111	17 U.S.C. § 111
Section 119	17 U.S.C. § 119
Section 302	Section 302 of the Satellite Television Extension and Localism Act of 2010
Section 302 Report	Section 302 of the Satellite Television Extension and Localism Act of 2010, Report Of The Register Of Copyrights To Congress (August 29, 2011).
SSO	Satellite System Operator
STELA	Satellite Television Extension and Localism Act of 2010

**MPAA RESPONSE TO PROPOSED FINDINGS OF FACT
AND PROPOSED CONCLUSIONS OF LAW**

I. MPAA Response To IPG's Proposed Findings Of Fact

1. **IPG PFF ¶ 10:** This PFF is incomplete, as it provides only a portion of the Judges' ruling in their *Order Reopening Record And Scheduling Further Proceedings* (May 4, 2016) ("May 4 Order"). In addition to the language quoted by IPG, the Judges also concluded (with regard to the MPAA methodology) that MPAA needed to present either "(1) contemporaneous data (whether local ratings and distant viewership data, as Dr. Gray utilized, or other data and analysis that might underlie a modified methodology); or (2) competent evidence that persuades the Judges that such data are not needed to produce reliable results from MPAA's viewership-based methodology." *See* May 4 Order at 4. MPAA has now provided such evidence in this proceeding. Exhibit 8002 at 10; Tr. at 393-400 (Gray).

2. **IPG PFF ¶¶ 11-12:** These PFFs mischaracterize the record by incorrectly referring to the instant matter as a "Remand" proceeding, and inaccurately characterizing the parties' Written Direct Statements and IPG's Amended Direct Statement as "Remand" pleadings. The Judges have ruled that such "remand" references are inaccurate. *See Order Granting IPG Fourth Motion For Modification of March 13, 2015 Order* at 1, n.1 (October 27, 2016) ("In its Motion, IPG altered the caption to refer to the consolidated proceeding as a "remand." This matter is not on remand; rather, the Judges found insufficient evidence upon which to base a determination and chose to reopen the record for further proceedings.").

3. **IPG PFF ¶ 13:** This PFF is incomplete and misleading. Only MPAA and SDC filed Written Rebuttal Statements in this proceeding on December 15, 2017. IPG "elected not to file" a Written Rebuttal Statement. *See Independent Producers Group's Notice Regarding*

Written Rebuttal Statements Pending Resolution Of Worldwide Subsidy Group v. Hayden at 1-2 (December 15, 2017).

4. **IPG PFF ¶ 15:** This PFF mischaracterizes the Judges’ evidentiary rulings and the state of the record in this proceeding. *See Order Granting In Part Joint Motion In Limine And Denying Joint Motion For Summary Disposition* at 1-5 (April 6, 2018); Tr. at 38-39, 140-47 (Barnett, C.J.).

5. **IPG PFF ¶ 19:** This PFF mischaracterizes the record by referring to the instant matter as a “remand proceeding.” *See Response to IPG PFF ¶¶ 11-12, supra.*

6. **IPG PFF ¶ 20:** This PFF mischaracterizes the record. Dr. Gray testified that, in addition to incorporating additional Nielsen Distant Viewing Household Meter Data for 2008 and 2009 (cable and satellite), he also modified his regression specification to address the Judges’ concerns set forth in their May 4, 2016 Order. *See May 4 Order* at 4, n.5; Tr. at 393-94 (Gray). While Dr. Gray’s original cable analysis incorporated 1.68 million observations of distant viewing from Nielsen diaries, his revised cable analysis now incorporates 3.86 million observations of distant viewing. The number of observations of satellite distant viewing also increased by a similar order of magnitude. Tr. at 395-96 (Gray). Dr. Gray also testified that he did not expect additional distant viewing data for the 2004-2007 years to have any impact on his analysis. Tr. at 396-97, 402-04 (Gray).

7. **IPG PFF ¶ 21:** This PFF mischaracterizes the record. Dr. Gray testified that additional distant viewing data for 2004-2007 cable and satellite was “nearly impossible to obtain,” and that he would not expect it to have any impact on his analysis. Tr. at 396-97, 402-04 (Gray). Mr. Lindstrom testified that acquiring additional distant viewing data for 2004-2007

would have been “impossible” within the three-month period between the issuance of the Judges’ May 4 Order and the August 2016 deadline for submitting Written Direct Statements for this proceeding. Tr. at 310-11, 348-49, 365-66 (Lindstrom).

8. **IPG PFF ¶ 22:** This PFF is offered in violation of the Judges’ *Order On Joint Motion RE Post-Hearing Scheduling*, as it fails to provide a “direct reference and citation to the record in this proceeding” as support. *See Order On Joint Motion RE Post-Hearing Scheduling* at 1 (April 19, 2018) (“April 19 Order”). IPG PFF ¶ 22 also mischaracterizes the record. Dr. Gray explained how he calculated a mathematical relationship between distant viewing data and “a host of [other] factors,” including local ratings, time of day, program type, the total number of distant subscribers of that station, station affiliation, and also aggregate total royalty fees paid. Tr. at 399-400, 403-04 (Gray); Exhibit 8002 at 27-28.

9. **IPG PFF ¶ 23:** This PFF mischaracterizes the record. Dr. Gray testified that the 3.37%, 1.8%, and 1.3% calculations for 2000 satellite presented by IPG’s counsel during cross-examination were all “essentially volume-based measures.” Tr. at 413 (Gray). In sharp contrast, IPG’s viewership share for 2000 satellite was 0.46%. Tr. at 413-14 (Gray).

10. **IPG PFF ¶ 24:** This PFF mischaracterizes the record. Dr. Gray testified that he incorporated and applied the Judges’ Preliminary Hearing Order to his analysis, which awarded all conflicting program claims between MPAA and IPG to MPAA. Tr. at 414-16 (Gray); Preliminary Hearing Order at 25. Dr. Gray also explained that he did not recall performing any alternative calculations awarding conflicting program claims to IPG “[b]ecause the Judges did not rule in a different way.” Tr. at 416 (Gray).

11. **IPG PFF ¶ 25:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for all portions of the finding. *See* April 19 Order at 1. IPG PFF ¶ 25 also misstates the evidence. As an initial matter, Dr. Gray testified repeatedly that the 6% statistic that appears in IPG PFF ¶ 25 (which IPG’s counsel calculated) was “incorrect.” Tr. at 427-29 (Gray). Further, Dr. Gray actually testified that he used regression analysis to calculate the mathematical relationship between distant viewing and (1) the local ratings for the program, (2) the total number of distant subscribers of that station, (3) the time of day the program aired by the quarter hour, (4) the type of program aired, (5) the station affiliation the program aired on, and (6) the aggregate total fees paid by CSOs or satellite carriers in the year the program aired. After he calculated that mathematical relationship, Dr. Gray estimated distant viewing on a quarter-hour by quarter-hour basis for each royalty year at issue in this proceeding, for both cable and satellite. Exhibit 8002 at 27; Tr. at 387-88 (Gray).

12. **IPG PFF ¶ 26:** This PFF is inaccurate. Dr. Gray testified that he either had or estimated local ratings data for all of the programs on all of the stations in his sample for each of the 2004-2009 cable and 2000-2009 satellite royalty years. Exhibit 8002 at 19 and 28, n.41; Tr. at 397, 476-77 (Gray).

13. **IPG PFF ¶ 27:** This PFF is inaccurate. Nielsen local ratings are available in all 210 Nielsen DMAs. Tr. at 181 (Sanders), at 363 (Lindstrom). Mr. Lindstrom also testified that the NPM sample (which uses only Nielsen meter data) covers all 210 Nielsen DMAs. Tr. at 363 (Lindstrom). Dr. Gray employed a representative, stratified random sample in which the signals that were distantly retransmitted to a greater number of subscribers were selected with higher probability for the 2004-2009 cable and 2000-2006 satellite royalty years, and used the entire

population of distantly retransmitted stations for the 2007-2009 satellite royalty years. Exhibit 8002 at 16-17; Tr. at 384-85 (Gray).

14. **IPG PFF ¶ 28:** This PFF is incomplete. Dr. Gray testified that he was only required to impute local ratings in “those unusual circumstances where Nielsen does not have a local rating.” Tr. at 450-52, 469-70 (Gray). When Dr. Gray was required to impute local ratings, he did so based on the average local ratings for that Gracenote program type at the particular quarter hour. Tr. at 450-52, 471-72 (Gray).

15. **IPG PFF ¶¶ 29-30:** These PFFs are offered in violation of the April 19 Order, as they fail to provide a “direct reference and citation to the record in this proceeding” as support for all portions of the finding. *See* April 19 Order at 1. IPG PFF ¶¶ 29-30 provide only a generic citation to the *entirety* of Dr. Gray’s written and oral testimony as purported support for IPG’s claim that he *did not* “present evidence” regarding particular matters that IPG recites in its findings. However, contrary to these PFFs, Dr. Gray testified that his revised cable analysis now incorporates 3.86 million observations of distant viewing, and that the number of observations of satellite distant viewing was of a similar order of magnitude. Tr. at 395-96 (Gray).

16. **IPG PFF ¶ 31:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for all portions of the finding. *See* April 19 Order at 1. IPG PFF ¶ 31 provides only a generic citation to the *entirety* of Dr. Gray’s written and oral testimony as purported support for IPG’s claim that he *did not* “present evidence” regarding particular matters that IPG recites in its finding. However, contrary to this PFF, Dr. Gray provided statistics on the number of distant broadcast retransmissions (and the number of minutes of distant broadcast retransmissions) that he

measured on his sample stations for both IPG and MPAA. Exhibit 8002 at 24-25 (Tables 2 and 3). These are volume-based measures and (contrary to IPG’s inaccurate implication in IPG PFF ¶ 31) do not incorporate or depend on any measure of viewing for their calculation. Exhibit 8002 at 26-27; Tr. at 413-14 (Gray).

17. **IPG PFF ¶ 32:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for all portions of the finding. *See* April 19 Order at 1. This PFF also mischaracterizes the evidence. When Dr. Gray was required to impute local ratings, he did so based on the average local ratings for that Gracenote program type at the particular quarter hour. Exhibit 8002 at 28; Tr. at 450-52, 471-72 (Gray). IPG’s claim in IPG PFF ¶ 32 that certain indicia were somehow “double-factored” in Dr. Gray’s distant viewing predictions is without *any* record support.

18. **IPG PFF ¶ 33:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for all portions of the finding. *See* April 19 Order at 1. This PFF also mischaracterizes the evidence. Dr. Gray testified repeatedly that he disagreed with IPG’s counsel’s calculation regarding the purported amount of what IPG has referred to as positive measurements of distant viewership. Tr. at 427-29, 451-52 (Gray). Moreover, contrary to IPG’s inaccurate implication, Dr. Gray’s volume-based measures (*see* Responses to IPG PFF ¶¶ 23 and 31, *supra*) do not incorporate or depend on any measure of viewing for their calculation. Exhibit 8002 at 26-27; Tr. at 413-14 (Gray).

19. **IPG PFF ¶ 35:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for all

portions of the finding. *See* April 19 Order at 1. This PFF is also inaccurate, and mischaracterizes the record. Dr. Gray testified that his regressions incorporate the so-called zero viewing values that appear in the Nielsen distant diary and meter data, and that the zeros are used in the averaging. Tr. at 475 (Gray). Dr. Gray's regressions are not "ultimately calculating averages of positive figures" as IPG incorrectly states in IPG PFF ¶ 35. Dr. Gray also testified repeatedly that he disagreed with IPG's counsel's calculation regarding the purported percentage of occasions in which there is no positive distant viewership figure in the Nielsen Distant Viewing Diary Data and Nielsen Distant Viewing Household Meter Data. Tr. at 427-29, 451-52 (Gray).

20. **IPG PFF ¶ 36:** This PFF is inaccurate, and reflects a misunderstanding of Dr. Gray's methodology. As Dr. Gray explained, he was only required to impute local ratings in "those unusual circumstances where Nielsen does not have a local rating." Tr. at 450-52, 469-70 (Gray). The Nielsen Local Ratings Data that Dr. Gray relied on had a very low instance of zero (or unmeasured) values. Tr. at 421, 452, 470 (Gray). Dr. Gray also explained that, by applying his regression methodology, his distant viewing estimates reduce the instances of so-called zero distant viewing to less than 1%. Tr. at 421 (Gray). Dr. Gray's regressions are also not simply calculating an average of positive figures, as explained above. *See* Response to IPG PFF ¶ 35, *supra*.

21. **IPG PFF ¶ 37:** This PFF is offered in violation of the April 19 Order, as it fails to provide a "direct reference and citation to the record in this proceeding" as support for *any* portion of the finding. *See* April 19 Order at 1. Moreover, the finding is inaccurate, argumentative, and mischaracterizes the record evidence in this proceeding. *See* Responses to IPG PFF ¶¶ 25-36, *supra*.

22. **IPG PFF ¶ 38:** This PFF is incomplete. Immediately following the language from Dr. Gray’s written testimony quoted by IPG, Dr. Gray explains that “[t]he willing buyer’ in this hypothetical negotiation is the CSO or satellite carrier because it chooses which signal channels to retransmit on a distant basis. Both CSOs and satellite carriers offer bundled distant signal channels, cable channels, local broadcast channels and pay-per-view channels in different packages to existing and potential subscribers at varying prices.” Exhibit 8002 at 11-12.

23. **IPG PFF ¶ 39:** This PFF mischaracterizes the record. Dr. Gray testified that his conception of the hypothetical, unregulated market contemplates that CSOs and SSOs would be buyers of distant broadcast signal channels (as they are in the current regulated market), and that copyright owners and broadcast stations would need to negotiate in a primary market in order to determine the content that would be included on distant broadcast signals, which the broadcaster would then license for distant retransmission to CSOs and SSOs. Tr. at 454-58 (Gray); Exhibit 8002 at 11-12.

24. **IPG PFF ¶ 40:** This PFF mischaracterizes the record and misconstrues the hypothetical market that the Judges must apply in royalty distribution proceedings. As Dr. Gray explained, his construction of the hypothetical market is similar in some ways to the current regulated market, in that CSOs and SSOs would still be the buyers of broadcast signals that they would seek to retransmit to their subscribers in distant markets. Tr. at 454-58 (Gray); Exhibit 8002 at 11-12. Moreover, Dr. Gray’s construction of the hypothetical market is consistent with the Judges’ construction of the hypothetical market in recent Phase II proceedings and the Register of Copyrights’ preferred model for how an unregulated market would work absent the Section 111 and 119 licenses as described in the STELA Section 302 Report to Congress. *See* 2000-2003 Decision, 78 Fed. Reg. 64984, 64991-93 (October 30, 2013); 80 Fed. Reg. 13423,

13428-29 (March 13, 2015); STELA Section 302 Report at 66-75 (August 29, 2011), *available at* <https://www.copyright.gov/reports/section302-report.pdf> (last visited May 18, 2018).

25. **IPG PFF ¶ 41:** This PFF is incomplete. Dr. Gray also testified that CSOs and SSOs would find viewership ratings significant, because they are interested in attracting and retaining subscribers. Tr. at 458 (Gray); *see also* Exhibit 8002 at 12-13.

26. **IPG PFF ¶ 42:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for *any* portion of the finding. *See* April 19 Order at 1. Moreover, this PFF inappropriately seeks to inject factual findings based on the record in prior Allocation Phase proceedings into the record of this proceeding. Factual findings from prior proceedings are not legal precedent. Moreover, the Judges are not obligated to give the same weight given in prior proceedings to any particular piece of evidence presented here. *Indep. Producers Grp. v. Librarian Of Congress*, 792 F.3d 132, 143 (D.C. Cir. 2015); *Program Suppliers v. Librarian Of Congress*, 409 F.3d 395, 402 (D.C. Cir. 2005); *see also* Docket No. 2007-3 CRB CD 2004-2005, Oct. 6, 2009 Tr. at 32 (Sledge, C.J.) (“Precedent applies to questions of law. Precedent is never applied to questions of fact.”). The Judges are required to define the hypothetical market for this proceeding based on the evidence in the record before them. *See* 2000-2003 Decision, 78 Fed. Reg. at 64992-93. MPAA presented evidence regarding the hypothetical market the Judges should apply in this proceeding as a part of Dr. Gray’s testimony. *See* Exhibit 8002 at 11-12, Tr. at 454-58 (Gray).

27. **IPG PFF ¶ 43:** This PFF misconstrues the record. Both Dr. Gray and Dr. Erdem testified that they disagreed with the factual findings regarding viewing made by the CARP in the 1998-99 Cable Allocation Phase decision, especially to the extent that those findings were

interpreted by IPG as suggesting that CSOs and SSOs do not care about viewing. Both Dr. Gray and Dr. Erdem testified that viewership is a direct measure of relative market value because CSOs and SSOs are concerned about attracting and retaining subscribers, and viewership is the best way to measure actual and/or potential subscriber value. Tr. at 82-84, 135-37 (Erdem); at 378, 459-65 (Gray).

28. **IPG PFF ¶ 44:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for the last sentence. *See* April 19 Order at 1. The last sentence of IPG PFF ¶ 44 is also misleading. There is no support in the record for IPG’s suggestion that statutory license royalty fees are somehow correlated with distant subscribership. Instead, the record demonstrates that viewership is a reasonable proxy for subscribership. Tr. at 137 (Erdem); Exhibit 8002 at 14-15.

29. **IPG PFF ¶ 45:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for *any* portion of the finding. *See* April 19 Order at 1. Moreover, this PFF is inaccurate. The record in this proceeding includes the designated testimony of Toby Berlin, who worked as a Vice President of Programming Acquisitions at DirecTV from 1998 to 2013. Ms. Berlin testified that CSOs and SSOs rely on Nielsen viewing information when making decisions regarding whether to retransmit broadcast stations out of market. Exhibit 7002 at 3, 6-7; Exhibit 7003 at 61-64, 81-82, 84-86.

30. **IPG PFF ¶ 46:** This PFF inappropriately seeks to inject factual findings based on the record in prior Allocation Phase proceedings into the record of this proceeding. Factual findings from prior proceedings are not legal precedent. The Judges are required to define the

hypothetical market for this proceeding based on the evidence in the record before them. *See* Response to IPG PFF ¶ 42, *supra*.

31. **IPG PFF ¶ 48:** This PFF mischaracterizes the record. Dr. Gray testified that while there are different types of heterogeneous programming types that make up the Program Suppliers category, the types of programs that fall within the Program Suppliers category are “more homogenous than across the[] Phase I categories.” Tr. at 440-41 (Gray). This is consistent with the Judges’ findings regarding the Program Suppliers’ category in the 2000-2003 Decision. *See* 2000-2003 Decision, 78 Fed. Reg. at 64996 (“The Judges agree with Dr. Gray that the programs within the Program Suppliers category are more homogenous *inter se* than they are in comparison with programs in either the Sports Programming or Devotional Programming categories.”).

32. **IPG PFF ¶ 51:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for the last sentence. *See* April 19 Order at 1. IPG PFF ¶ 51 is also misleading. Dr. Gray explained the station affiliation data he relied on in both his written and oral testimony. *See* Exhibit 8002 at 19-22, 27-28; Tr. at 437, 441-43 (Gray).

33. **IPG PFF ¶ 53:** This PFF mischaracterizes the record. The language and assertions set forth in this PFF bear no relationship to the portion of the record cited by IPG. The transcript of Dr. Gray’s testimony cited by IPG as support for IPG PFF ¶ 53 actually reads as follows:

Q: So to kind of sum this up about these different indicia we’ve just been talking about, I think—is it accurate for me to characterize your testimony and your methodology with regard to

these indicia that you're saying that your regressions show that the number of distant subscribers, the time of day broadcast, fees paid by CSOs and SSOs all significantly affect distant viewing and, therefore, your attributed value at the end of the analysis?

A: Yeah, I didn't hear you say local ratings, and local ratings as well, yes.

Tr. at 446 (Gray).

34. **IPG PFF ¶ 55:** This PFF mischaracterizes the record. The transcript of Mr. Lindstrom's testimony cited by IPG as support for IPG PFF ¶ 55 actually reads as follows:

Q: Have you calculated the incidents of zero viewing in preparation for this proceeding?

A: No, I did not.

Q: Were you asked to?

A: No, I was not.

Q: Were you directed not to?

A: No, I was not.

Tr. at 331-32 (Lindstrom). Mr. Lindstrom also testified that his testimony about incidents of zero viewing in Nielsen's custom analyses "meet[ing] with [his] expectations" was based on his more than thirty years of industry knowledge and experience. Tr. at 334 (Lindstrom).

35. **IPG PFF ¶ 56:** This PFF inappropriately seeks to inject factual findings based on the record in the 1997 Cable Phase II proceeding (which were later *vacated* by the Librarian, *see* 69 Fed. Reg. 23821 (April 30, 2004)) into the record of this proceeding. Factual findings from prior proceedings are not legal precedent. *See* Response to IPG PFF ¶ 42, *supra*. The Judges are required to evaluate the Nielsen data presented in this proceeding based on the evidence in the

record before them, which demonstrates that Dr. Gray's regression methodology reduces the instances of so-called zero distant viewing in his estimates to less than 1%. Tr. at 421 (Gray).

36. **IPG PFF ¶ 57:** This PFF mischaracterizes the record. IPG cites to "Exhibit 8001 at 357" as support for IPG PFF ¶ 57, but Exhibit 8001 only has pages 1-8. *See, e.g.,* Exhibit 8001. As a result, IPG has violated the April 19 Order by failing to provide a "direct reference and citation to the record in this proceeding" as support for IPG PFF ¶ 57. *See* April 19 Order at 1. This PFF also presents an incomplete and inaccurate account of Mr. Lindstrom's written and oral testimony regarding so-called zero viewing. Exhibit 8001 at 8; Tr. at 334-44, 350-60 (Lindstrom).

37. **IPG PFF ¶ 58:** This PFF is incomplete. Dr. Gray also testified that his regression methodology reduces the instances of so-called zero distant viewing in his estimates to less than 1%. Tr. at 421 (Gray).

38. **IPG PFF ¶ 59:** This PFF is inaccurate. Dr. Gray testified that zero (or unmeasured) incidents in the Nielsen Local Ratings Data were unusual. Tr. at 450-51 (Gray). Dr. Gray also testified that the Nielsen Local Ratings Data that Dr. Gray relied on had a very low instance of zero (or unmeasured) values. Tr. at 421, 450-52, 470 (Gray). Moreover, contrary to IPG PFF ¶ 59, Dr. Gray testified that he did not calculate the incidence of zero or non-recorded local ratings in the 2000-2009 Nielsen Local Ratings Data because it would have been "too small to calculate." Tr. at 421 (Gray).

39. **IPG PFF ¶ 60:** This PFF mischaracterizes the record. Dr. Gray repeatedly disagreed with IPG's counsel's purported calculation of the percentage of so-called zero viewing incidents in the Nielsen Distant Viewing Diary Data. *See* Tr. at 427-29, 451-52 (Gray); *see also*

Responses to IPG PFF ¶¶ 33, 35. Dr. Gray testified that his regressions incorporate the so-called zero viewing values that appear in the Nielsen Distant Viewing Diary and Household Meter Data, and that the zeros are used in the averaging. Tr. at 475 (Gray). Dr. Gray also explained that, by applying his regression methodology, his distant viewing estimates reduce the instances of so-called zero distant viewing to less than 1%. Tr. at 421 (Gray).

40. **IPG PFF ¶¶ 61-62, 113:** These findings inappropriately seeks to inject factual findings based on the record in the 1997 Cable Phase II proceeding (which were later *vacated* by the Librarian, *see* 69 Fed. Reg. 23821 (April 30, 2004)) into the record of this proceeding. Factual findings from prior proceedings are not legal precedent. *See* Response to IPG PFF ¶ 42, *supra*. The Judges are required to evaluate the Nielsen data presented in this proceeding based on the evidence in the record before them, which demonstrates that Dr. Gray's regression methodology reduces the instances of so-called zero distant viewing in his estimates to less than 1%. Tr. at 421 (Gray). Moreover, the D.C. Circuit already affirmed the Judges' finding in the 2000-2003 Decision that Dr. Gray's regression methodology adequately addressed the so-called zero viewing issue. *See Indep. Producers Grp.*, 792 F.3d at 143.

41. **IPG PFF ¶ 63:** This PFF misconstrues the record. Mr. Lindstrom testified that while he was not himself a statistician, he had considerable experience using statistics as a part of his 39 years designing custom analysis and custom research projects while working at Nielsen. Tr. at 282-85, 288-90 (Lindstrom). In addition, MPAA presented the testimony of Dr. Gray, who was qualified as an expert in the fields of economics, statistics, and econometrics. Tr. at 374 (Gray).

42. **IPG PFF ¶¶ 64-65:** These findings misconstrue the record. Mr. Lindstrom testified that Nielsen had taken steps to improve its processes over the years in response to rulings made in royalty distribution proceedings and critiques of the Nielsen data offered by parties participating in those proceedings. Tr. at 355-56 (Lindstrom). However, Mr. Lindstrom also testified that incidents of so-called zero viewing were to be expected in a custom analysis of distant viewing, and were not defects in the process. Exhibit 8001 at 8; Tr. at 334-44, 350-60 (Lindstrom). Mr. Lindstrom also indicated that he would expect the percentage of so-called distant zero viewing to increase over time, and that this was consistent with the growth of cable and satellite distribution, penetration, the number of channels being offered, and fractionalization that has occurred in the industry over time. Tr. at 357-59 (Lindstrom).

43. **IPG PFF ¶ 66:** This PFF mischaracterizes the record. Dr. Gray testified that his regressions incorporate the so-called zero viewing values that appear in the Nielsen Distant Viewing Diary and Household Meter Data, and that the zeros are used in the averaging. Tr. at 475 (Gray). Dr. Gray also explained that his regression methodology reduces the instances of so-called zero distant viewing in his estimates to less than 1%. Tr. at 421 (Gray). Moreover, the D.C. Circuit already affirmed the Judges' finding in the 2000-2003 Decision that Dr. Gray's regression methodology adequately addressed the so-called zero viewing issue. *See Indep. Producers Grp.*, 792 F.3d at 143.

44. **IPG PFF ¶ 67:** This PFF is offered in violation of the April 19 Order, as it fails to provide a "direct reference and citation to the record in this proceeding" as support for *any* portion of the finding. *See* April 19 Order at 1. Moreover, the finding is misleading. The 1997 Cable Phase II decision has been vacated by both the Register and the Librarian, and, as a result, it has no precedential value in this proceeding. *See* 69 Fed. Reg. 23821 (April 30, 2004); *see*

also 17 U.S.C. 803(a)(1) (requiring the Judges to act “on the basis of” CARP decisions “to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights ...”).

45. **IPG PFF ¶ 70:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for *any* portion of the finding. *See* April 19 Order at 1. Moreover, the finding is incorrect. Dr. Gray testified that his methodology *does not* tend to treat similar programs that are distantly retransmitted at the same time of day, run for the same number of minutes per program, or that appear on the same station. Tr. at 447-48, 449-50 (Gray).

46. **IPG PFF ¶ 71:** This PFF is incomplete. As Dr. Gray explained, he was only required to impute local ratings in “those unusual circumstances where Nielsen does not have local ratings.” Tr. at 450-52, 469-70 (Gray). The Nielsen local ratings data that Dr. Gray relied on had a very low instance of zero (or unmeasured) values. Tr. at 421, 452, 470 (Gray). Dr. Gray also explained that, by applying his regression methodology, his distant viewing estimates reduce the instances of so-called zero distant viewing to less than 1%. Tr. at 421 (Gray).

47. **IPG PFF ¶ 74:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for the first sentence of the finding. *See* April 19 Order at 1. Moreover, the finding is incorrect. When Dr. Gray was required to impute local ratings, he did so based on the average local ratings for that Gracenote program type at the particular quarter hour. Tr. at 450-52, 471-72 (Gray).

48. **IPG PFF ¶ 76:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for *any*

portion of the finding. *See* April 19 Order at 1. Moreover, this PFF inappropriately seeks to inject factual findings based on the record in prior Allocation Phase proceedings into the record of this proceeding. Factual findings from prior proceedings are not legal precedent. *See* Response to IPG PFF ¶ 42, *supra*.

49. **IPG PFF ¶ 77:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for *any* portion of the finding. *See* April 19 Order at 1. Moreover, this PFF inappropriately seeks to inject factual findings based on the record in the 1997 Cable Phase II proceeding (which were later *vacated* by the Librarian, *see* 69 Fed. Reg. 23821 (April 30, 2004)) into the record of this proceeding. Factual findings from prior proceedings are not legal precedent. *See* Response to IPG PFF ¶ 42, *supra*.

50. **IPG PFF ¶ 78:** This PFF is offered in violation of the April 19 Order, as it both fails to provide a “direct reference and citation to the record in this proceeding” as support for the first sentence of the proposed finding, and engages in impermissible argument for the remainder of the proposed finding. *See* April 19 Order at 1. Moreover, IPG PFF ¶ 78 is misleading. Mr. Lindstrom testified that he does not like to mix methodologies within a particular Nielsen custom analysis, Tr. at 301-02 (Lindstrom), but these comments were unrelated to Dr. Gray’s regression analysis for this proceeding, which incorporates multiple different types of data from different sources. *See* Exhibit 8002 at 16-21. Mr. Lindstrom also testified that he was aware of Dr. Gray’s regression approach, and that he considered it “an effort to improve the measurement[s]” provided by Nielsen. Tr. at 355-56 (Gray). Mr. Lindstrom further testified that MPAA’s methodology presents “a fair representation of the relative amount of viewing going to those program[s] across times and station[s].” Exhibit 8014 at 411-12.

51. **IPG PFF ¶ 79:** This PFF is offered in violation of the April 19 Order, as it fails to provide a “direct reference and citation to the record in this proceeding” as support for *any* portion of the finding. *See* April 19 Order at 1. Moreover, IPG PFF ¶ 79 is misleading. *See* Response to IPG PFF ¶ 78.

52. **IPG PFF ¶ 80:** This PFF is inaccurate. Nielsen was aware of Dr. Gray’s intended use of both the 2000-2003 Nielsen Distant Viewing Diary Data and the 2008-2009 Nielsen Distant Viewing Household Meter Data, and found it reasonable. *See* Response to IPG PFF ¶ 78.

II. MPAA Response To SDC’s Proposed Findings Of Fact

53. **SDC PFF ¶ 11:** The last sentence of this PFF misstates the record evidence. As Dr. Gray explained, he was only required to impute local ratings in “those unusual circumstances where Nielsen does not have *local ratings*.” Tr. at 450-52, 469-70 (Gray) (emphasis added); *see also* Exhibit 8002 at 28, n.41. Contrary to SDC PFF ¶ 11, Dr. Gray did not testify that he imputed local ratings “into non-metered markets for which he lacks viewership data.” *See id.*

54. **SDC PFF ¶ 25:** This PFF is incomplete. Dr. Gray testified that he did not know if program category homogeneity was necessary for viewership evidence to be relevant and useful for determining the relative market value of programming across multiple program categories, especially since the program categories used in cable and satellite royalty distribution proceedings are “somewhat of an artificial construct.” Tr. at 440-41 (Gray).

55. **SDC PFF ¶ 29:** This PFF mischaracterizes Mr. Lindstrom’s testimony. Mr. Lindstrom testified that the NPM database was the most reliable source of viewership data available for the later royalty years at issue in this proceeding because of changes in the industry,

including the replacement of Nielsen diaries with Local People Meters in more markets. Tr. at 300-08 (Lindstrom). Mr. Lindstrom also testified that “The National People Meter covers all 210 markets as well.” Tr. at 363 (Lindstrom).

56. **SDC PFF ¶ 32:** The last two sentences of this PFF and related footnote 2 mischaracterize Mr. Lindstrom’s testimony. Contrary to SDC PFF ¶ 32, the Nielsen Diary Studies were created by Nielsen, not a “former MPAA contractor.” Exhibit 8001 4-6. In addition, Mr. Lindstrom testified that the Nielsen NPM database (which MPAA relied on to measure distant cable and satellite viewing for 2008 and 2009) “covers all 210 markets.” Tr. at 363 (Lindstrom).

III. MPAA Response To IPG’s Proposed Conclusions Of Law

1. **IPG PCL ¶ 126:** The last sentence of this PCL misstates the Judges’ findings in the 2000-2003 Decision. There, the Judges defined the hypothetical market that they would apply in that proceeding as follows (incorporating references to both the fact that CSOs acquire retransmitted broadcast stations in their entirety, and the initial bundling of programs by broadcast stations):

[T]he hypothetical market the Judges will apply in this Determination contains the following participants and elements: (1) The hypothetical seller is the owner of the copyrighted program; (2) the hypothetical buyer is the CSO that acquires the program as part of its hypothetical bundle of programs; and (3) the absence of compulsion requires that the terrestrial stations’ initial bundling of programs does not affect the marginal profit-maximizing decisions of the hypothetical buyers and sellers.

2000-2003 Decision, 78 Fed. Reg. at 64993.

2. **IPG PCL ¶ 128:** This PCL is incomplete, as it omits any reference to the portion of the statutory language appearing in Section 803(a)(1) that makes it clear that the Judges

shall act “on the basis of . . . prior determinations and interpretations” of past CARPs only “to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights.” 17 U.S.C. § 803(a)(1).

3. **IPG PCL ¶ 131:** This PCL is incomplete. As Librarian of Congress observed in the 1998-99 Cable Allocation Phase decision cited by IPG, “[i]t would make little sense to require the CARPs to apply Tribunal [and CARP] precedent in all circumstances, and allow no deviation, especially in the area of determining the relevant factors for distributing royalties.” 69 Fed. Reg. 3606, 3614 (Jan. 26, 2004). Moreover, the D.C. Circuit has issued several decisions following the issuance of the 1998-99 Cable Allocation Phase decision cited by IPG regarding the circumstances under which the Judges may deviate from precedent. According to the D.C. Circuit, the Judges “are free to depart from precedent if they provide reasoned explanations for their departures.” *See Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1014 (D.C. Cir. 2014); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 762 (D.C. Cir. 2009); *see also Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 402 (D.C. Cir. 2005).

4. **IPG PCL ¶ 132:** This PCL is based entirely on findings of fact from Allocation Phase proceedings, and, as such, is inapplicable to the instant Distribution Phase proceeding. As the D.C. Circuit has observed, the Judges “complied with the applicable precedent” when they accepted MPAA’s viewership-based methodology in the 2000-2003 Decision. *See Indep. Producers Grp.*, 792 F.3d at 142 (“The Board’s acceptance of MPAA’s viewership-based methodology was therefore consistent with precedent from past Phase II proceedings.”). The D.C. Circuit also affirmed the Judges’ reliance on viewership-based methodology recently in a Phase II proceeding regarding the Devotional category. *See*

Settling Devotional Claimants v. CRB, No. 15-1084, 2017 U.S. App. Lexis 2462, at *2 (D.C. Cir. Feb. 10, 2017) (“The Judges’ ...decision to rely on a viewership-based methodology, which IPG contests, has previously been upheld by this court.”).

5. **IPG PCL ¶¶ 133-49:** These PCLs are all offered in violation of the April 19 Order. First, none of these PCLs “directly relate to the legal standards guiding the Judges determination.” April 19 Order at 1. Second, none of these PCLs provide *any* supporting citations to relevant legal authorities, as required by the April 19 Order. *See* April 19 Order at 1 (“Proposed Conclusions of Law may be derived from statute, regulation, applicable precedent, or other primary or secondary legal authority. Participants shall support each proposed conclusion of law with one or more citations to relevant authority or authorities.”). Indeed, IPG PCL ¶¶ 133-49 fail to provide any citations to any form of authority *at all*. Moreover, IPG PCL ¶¶ 133-41 are all directly contradicted by the record evidence in this proceeding. *See, supra*, Responses to IPG PFF ¶¶ 20-33, 35-46, 48-51, 53, 55, 56-67, 70-71, 74, 76-80, and 113.

IV. MPAA Response To SDC’s Proposed Conclusions Of Law

6. **SDC PCL ¶ 50:** The last sentence of this PCL misquotes 17 U.S.C. § 803(a)(1). The statutory language appearing in Section 803(a)(1) makes it clear that the Judges shall act “on the basis of . . . prior determinations and interpretations” of past CARPs only “to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights.” 17 U.S.C. § 803(a)(1).

Respectfully submitted,

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May 18, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent electronically on May 18, 2018, and also served via the eCRB system on the following:

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Certificate of Service

I hereby certify that on Friday, May 18, 2018 I provided a true and correct copy of the MPAA-Represented Program Suppliers' Response to Proposed Findings of Fact and Proposed Conclusions of Law to the following:

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